In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 571

JOSEPH SCATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1967. On August 9, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to September 3, 1967. The petition was

filed on September 5, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported petitioner's conviction for concealing assets of a bankrupt estate from the trustee in bankruptcy.

2. Whether venue was proper.

3. Whether testimony of two government accountants was properly received.

STATUTE INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
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> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or
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[1] September 3 was a Sunday, September 4 was a holiday.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Connecticut on six counts charging violations of the bankruptcy act and conspiracy. On October 17, 1966, he was sentenced to imprisonment for three years on each count, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

Counts 1 and 4 charged concealment of assets from the trustee in violation of 18 U.S.C. 152, paragraph 1; counts 3, 6 and 7 charged fraudulent transfers in violation of paragraph 6. The government's evidence showed that co-defendant Irwin Gordon [2] was president, and petitioner secretary, of National Furniture and Appliance Stores, a Connecticut corporation operating discount stores at Rocky Hill and other Connecticut locations (Tr. 387, 734-735).[3] In January 1963 Gordon and petitioner opened another discount store in Newburgh, New York, incorporated under the laws of New York as National Discount Stores of Newburgh, New York (Tr. 490). Between January and May 1963, truckloads of merchandise from the

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[2] Irwin Gordon was convicted of the six counts of which petitioner was convicted, together with two other counts charging him with making false oaths in violation of paragraph 2 of Section 152. His petition for a writ of certiorari is pending as No. 474, this Term.

[3] References are to the transcript of trial which has been lodged with the Clerk of this Court.

Rocky Hill store in Connecticut were shipped to the Newburgh store (*e.g.*, Tr. 107-112, 193-200, 287, 297, 364-369, 492). Two accountants, who reconstructed the purchases and sales of the Rocky Hill store, estimated the value of goods shipped to the Newburgh store to be $57,000 and $72,000, respectively (Tr. 45, 328). Count 7 of the indictment charged that this merchandise was fraudulently transferred in contemplation of bankruptcy.

Other evidence showed that a truck belonging to the Rocky Hill store was driven to and used in Newburgh (Tr. 287, 493) and that funds belonging to a bank account of the Rocky Hill store were transferred to a new account in Newburgh (Tr. 386-387). After the Rocky Hill store had been adjudicated a bankrupt, and a trustee had been appointed (Tr. 14-15), neither petitioner nor Gordon disclosed the existence of the truck or the bank account. Counts 1 and 4 charged the concealment of the truck and bank account, respectively, from the trustee, while Counts 3 and 6 charged the fraudulent transfer of the truck and bank account in contemplation of bankruptcy.

ARGUMENT

1. Petitioner contends that, inasmuch as the evidence showed that the truck and bank account were transferred to the Newburgh store prior to the appointment of the trustee, there could be no concealment from the trustee as charged in counts 1 and 4.[4]

[4] Petitioner does not challenge the sufficiency of the evidence establishing his guilty knowledge.

However, it is well established that "concealment", within the meaning of paragraph 1 of Section 152, includes withholding from the trustee knowledge of the existence or whereabouts of assets of the bankrupt estate, *United States* v. *Schireson*, 116 F. 2d 881, 884 (C.A. 3); *Coghlan* v. *United States*, 147 F. 2d 233, 236 (C.A. 8), certiorari denied, 325 U.S. 888, and there is ample evidence that petitioner knowingly withheld knowledge of the existence of the truck and bank account after the appointment of the trustee. See *United States* v. *Shapiro*, 101 F. 2d 375, 378-379 (C.A. 7).[5] In all events, petitioner does not challenge his convictions on counts 3, 6, 7, and 8, any of which completely supports the punishment, since concurrent sentences were imposed. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339.

2. Also without merit is petitioner's contention that venue was improper with respect to counts 1 and 4. The substance of the challenged counts—the withholding of information from the trustee—occurred in the District of Connecticut, the situs of the trustee. Venue was, therefore, properly laid in that district. *United States* v. *Schireson*, 116 F. 2d 881, 884

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[5] *United States* v. *Stone*, 282 F. 2d 547 (C.A. 2), upon which petitioner relies, is not to the contrary. That case held that, in order to establish concealment, it must be shown that the defendant had possession of the assets alleged to have been concealed after the trustee had been appointed. There is ample evidence that petitioner had possession of the truck and bank account after appointment of the trustee, since both assets were in the possession of the Newburgh, New York, corporation of which he was an owner.

(C.A. 3). Moreover, as noted above, the convictions on counts 3, 6, 7, and 8, fully support the sentence.

3. In order to establish the value of the merchandise transferred from the Rocky Hill to the Newburgh store, the two accountants who testified for the government reconstructed the purchases and sales of the Rocky Hill store. As explained in their testimony, they subtracted the volume of sales by that store from the volume of purchases (as reflected by invoices and other records kept by the defendants) to arrive at a figure representing the missing inventory (*e.g.*, Tr. 36-45). These invoices and other records upon which the accountants based their analyses and conclusions were marked for identification (Tr. 18), but were never formally offered and received in evidence. Petitioner's contention that failure to do so constitutes reversible error is without merit. The best-evidence rule does not require that voluminous records which are summarized at trial be formally received in evidence, but only that they "* * * be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available." 4 Wigmore on *Evidence* § 1230 (3rd ed. 1940); see, also, *Greenhill* v. *United States*, 298 F. 2d 405, 412 (C.A. 5), certiorari denied, 371 U.S. 830; *Cabel* v. *United States*, 113 F. 2d 998, 1001 (C.A. 1). The records which the accountants summarized were marked for identification and were available to petitioner for use in cross-examination if he so desired.

Raub v. *Carpenter*, 187 U.S. 159, upon which petitioner relies, requires no different procedure. In that case, this Court merely applied the well established principle that the facts upon which an expert bases his conclusions must be made known to the jury. In the present case, the underlying facts—the volume of purchases and sales made by the Rocky Hill store—were so attested. The experts could, therefore, properly testify to their conclusions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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